Cincinnati Mailers Union No. 17 *and* S. Rosenthal & Company, Inc. and Graphic Arts International Union, Local 508, O-K-I, AFL-CIO. Case 9-CD-410

December 16, 1982

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by S. Rosenthal & Company, Inc., herein called the Employer, alleging that Cincinnati Mailers Union No. 17, herein called the Mailers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by Graphic Arts International Union, Local 508, O-K-I, AFL-CIO, herein called Graphic Arts.

Pursuant to notice, a hearing was held before Hearing Officer Richard W. Kopenhefer on August 26, 1982. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, an Ohio corporation with a place of business in Cincinnati, Ohio, is engaged in the production and sale of various printed materials at its Cincinnati, Ohio, location. During the past year, a representative period, the Employer derived gross receipt in excess of $500,000 and purchased goods and materials from outside the State having a value of $50,000. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Mailers and Graphic Arts are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer prints and binds various publications, including T.V. Guide Magazine, at its Cincinnati, Ohio, plant in which members of both the Mailers and Graphic Arts are employed.[1] Prior to 1980, the Employer had used only the "saddle stitch" method of binding. However, in the fall of 1980, the Employer switched from the saddle stitch method of binding to "perfect binding."[2] To put this method into effect, the Employer purchased and installed two Harris Perfect Binders. The Employer also purchased in-line mailing equipment which was attached to the Harris Perfect Binders.[3] This equipment had the capacity of "shrink-wrapping"[4] magazines and placing subscription labels on individual copies.

On November 1, 1980, the Mailers and the Employer executed a new collective-bargaining contract which includes the following provision:

> Any work beyond the trimmers on the Perfect Binder that involves publications or commercial work that are tied or shrink-wrapped and are mailed or distributed to newsstands will be under the jurisdiction of the Mailers.

On December 12, 1980, the Employer notified the Mailers and Graphic Arts that the Harris Perfect Binders would be in operation on January 15, 1981. The Employer in a letter informed Graphic Arts, "Our company interprets its jurisdiction with Cincinnati Mailers Union No. 17 to include any work beyond the trimmers on the Perfect Binder that involves publications or commercial work that are tied and/or shrink-wrapped and are mailed or distributed to newsstands." In response, Graphic Arts filed a grievance which alleged that the Employer violated its collective-bargaining contract by assigning the work beyond the trimmers to members of the Mailers.[5] By agreement, the griev-

[1] The Employer has had collective-bargaining contracts with both Unions for many years.

[2] Perfect binding employs adhesive rather than stitching to bind the pages of publications.

[3] It is the operation of the in-line mailing equipment which is the basis of the dispute herein.

[4] An operation by which magazines are automatically grouped into bundles of 50 and mechanically wrapped for distribution.

[5] In the spring of 1981, the Employer and Graphics Arts began negotiations for a new contract, and a contract was signed on July 16, 1981, effective retroactively to April 1, 1981. There is nothing in the record to indicate that the work beyond the trimmers was a subject of the negotiations.

ance was held in abeyance until "the bugs" could be worked out of the new operation. No change having taken place with respect to the assignment of the work beyond the trimmers, in June 1982 Graphic Arts requested the Employer to reinstate the grievance, including arbitration. The Employer refused, asserting that the alleged grievance was a jurisdictional dispute which could not be resolved by arbitration but which should be decided by the National Labor Relations Board. In addition, the Employer asserted that the work beyond the trimmers was included in the jurisdiction provision of its contract with the Mailers. On July 12, 1982, counsel for Graphic Arts wrote the Employer and threatened to bring suit in the district court "to compel arbitration of the dispute." Thereafter, during a meeting with Mailers Representatives James Ruth and Rudy Cummings, Frank Sciutto, the Employer's personnel manager, explained that Graphic Arts had threatened to sue the Employer to compel arbitration as to the work beyond the trimmers on the Harris Perfect Binder. Ruth replied, "Frank, if this goes to arbitration and we lose the work that has already been awarded to us, we are going to do everything in our power to protect our work up to and including strike." Sciutto then informed Ruth and Cummings that he would file a charge with the Board and have it adjudicate "this jurisdictional question." Sciutto testified that he neither requested nor anticipated that the Mailers would threaten strike action.

B. *The Work in Dispute*

The parties agree that the work in dispute consists of the work beyond the fifth knives, or trimmers, on the Harris Perfect Binders at the Employer's Cincinnati, Ohio, bindery plant, involving tying or shrink-wrapping of commercial work or publications which are then mailed or distributed to newsstands.

C. *The Contentions of the Parties*

The Mailers[6] contends that its collective-bargaining contract with the Employer gives it jurisdiction over the disputed work. The Mailers further contends that assignment of this work to employees it represents is consistent with the Employer's practice and preference; that the employees represented by the Mailers have the skills necessary to perform the disputed work; and that the economy and efficiency of the operation require that the mailer employees do the work beyond the fifth trimmers on the Harris Perfect Binders.

Graphic Arts argues that the statement made by Mailers Representative Ruth does not constitute reasonable cause to believe that the Mailers has violated Section 8(b)(4) of the Act and, even if it does constitute a threat to strike, said threat is merely a pretext to confer jurisdiction on the Board.

With respect to the merits of the dispute, Graphic Arts contends that its collective-bargaining agreement with the Employer clearly confers jurisdiction over the disputed work to it. Although Graphic Arts concedes that the November 1981 agreement between the Mailers and the Employer also covered the disputed work, it argues that this agreement was an arbitrary attempt by the Employer to assign this work in violation of its contract with Graphic Arts; thus the contractual award of the disputed work to the Mailers is nullified by the contractual award of the same work to Graphic Arts.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

As set forth above, Mailers Representative James Ruth informed Frank Sciutto, the Employer's personnel manager, that if the grievance filed by Graphic Arts went to arbitration and the disputed work was awarded to Graphic Arts then the Mailers would do everything in its power to protect the work "including strike." Graphic Arts contends that this statement does not constitute a threat to strike, and, even if it does, it is a mere pretext on the part of the Mailers in order to bestow jurisdiction on the Board. We do not agree. The statement on its face constitutes a threat to strike and there is no evidence that the Mailers representative was not serious in making the threat or had in any way colluded with the Employer in this matter. Indeed, the Employer's personnel manager, Sciutto, testified that he neither requested nor anticipated that the Mailers would make such a threat. Accordingly, we are satisfied that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.[7]

[6] The Employer did not file a brief; however, the brief filed by the Mailers relies heavily on the testimony presented by the Employer's witnesses at the hearing.

[7] See *Glaziers and Glassworkers Local Union No. 767 (Sacramento Metal & Glass Co.)*, 228 NLRB 200 (1977). See also *International Union of Operating Engineers, Local 542, AFL-CIO (C. J. Longenfelder and Son, Inc.)*, 241 NLRB 562 (1979).

It is undisputed that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

In view of the conduct above, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[8] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[9]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

The Employer has collective-bargaining agreements with both the Mailers and Graphic Arts. The agreement with the Mailers includes section 3(d), set forth *supra*, which gives it jurisdiction over the disputed work. Graphic Arts concedes that the Employer's contract with the Mailers awards the disputed work to the Mailers but contends that the award "is nullified" by the contractual award of the same work to it. The Graphic Arts contract with the Employer does not specifically mention the disputed work; however, section 3.2 of the contract includes "tying and wrapping" in the definition of bindery work which is within Graphic Arts jurisdiction, and article 12 of the contract states that "any new equipment or improvements installed or attached to existing equipment on the Bindery shall be subject to [Graphic Arts] jurisdiction." To the extent that the disputed work involves tying and wrapping it may be argued that section 3.2 favors an award of the disputed work to Graphic Arts. The flaw in this argument is that no provision is made in the contract for that portion of the work which involves the mailing or distribution of the product. Further, "tying and wrapping" is a term which also applies to manual labor. The absence of any specific mention of the disputed work, together with the failure to include all aspects of the disputed work in the Graphic Arts contract, compels us to conclude that the Mailers contract with the Employer which specifically covers all of the disputed work favors an award to employees represented by the Mailers.

2. Area and employer practice

No party contends that there is an area practice with respect to the disputed work and therefore this factor favors neither group of employees.

The Employer has used employees represented by the Mailers to perform the disputed work since the Harris Perfect Binders and the in-line mailing equipment was installed in 1981. A representative of the Employer testified that the disputed work involves dispatching and mailing of the Employer's product, jobs which had been assigned to the Mailers prior to the installation of the new binding equipment. Thus, the Employer's practice clearly weighs in favor of awarding the work to employees represented by the Mailers.

3. Skills and efficiency of operation

Graphic Arts contends that in-line mailing equipment tends to jam up frequently and that such breakdowns require skills possessed by employee-members of Graphic Arts who must continually unjam the bindery equipment. The record indicates that an employee-member of the Mailers has been assigned the responsibility for the care and maintenance of the in-line equipment and there are times when he will be given assistance by a member of Graphic Arts in unjamming the equipment. However, this assistance is given informally and is not part of the Graphic Arts member's job. In addition, Graphic Arts contends that the disputed work is a production operation which was assigned to employees it represents under its contract with the Employer and that these employees have the skills necessary to perform the work efficiently and well. An employer representative testified, however, that the disputed work is primarily a dispatching or distribution operation which prior to the installation of the in-line mailing equipment had been performed by employees represented by the Mailers. The employer representative further testified that members of the Mailers are trained to operate the sophisticated controls on the in-line mailing equipment and are more familiar with all aspects of distribution.

On the basis of the foregoing, we conclude that the skills possessed by the employees represented by the Mailers, including their experience in distribution, make it more efficient to award the disput-

[8] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL–CIO* [*Columbia Broadcasting System*], 364 U.S. 573 (1961)

[9] *International Association of Machinists, Lodge No. 1743, AFL–CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

ed work to employees represented by the Mailers.[10]

4. Employer assignment and preference

As stated above, the Employer assigned the disputed work to employees represented by the Mailers and this assignment has been consistently followed. Moreover, the Employer prefers that the work continue to be performed by these employees. Accordingly, these factors favor an award of the disputed work to employees represented by the Mailers.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by the Mailers are entitled to perform the work in dispute. We reach this conclusion relying on the Mailers collective-bargaining agreement with the Employer, the skills and efficiency of operation, the Employer's past practice, and the Employer's assignment and preference. In making this determination, we are awarding the work in question to employees who are represented by the Mailers, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

[10] The Mailers also contends that it is more economical for its members to perform the disputed work, since they are paid a lower hourly rate than the members of Graphic Arts. However, we do not regard the differences in wage rates as a factor in determining the economy of an operation. See *International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 229, AFL-CIO (M. H. Golden Construction Co.)*, 218 NLRB 1144, 1148 (1975).

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of S. Rosenthal & Company, Inc., who are represented by Cincinnati Mailers Union No. 17 are entitled to perform the work beyond the fifth knives, or trimmers, on the Harris Perfect Binders at the Employer's Cincinnati, Ohio, bindery plant, involving tying or shrink-wrapping of commercial work or publications which are then mailed or distributed to newsstands.